STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOSE GILBERTO HIGUERA, Defendant-Appellant.	FOR PUBLICATION January 30, 2001 9:00 a.m. No. 213557 Recorder's Court LC No. 97-008841 Updated Copy March 30, 2001

Before: M.J. Kelly, P.J., and Jansen and White, JJ.

JANSEN, J. (*concurring in part and dissenting in part*).

I concur with parts II through V of the majority opinion. I must dissent from part VI because I believe that the statute, MCL 750.14; MSA 28.204, is unconstitutionally vague, even as construed by *People v Bricker*, 389 Mich 524; 208 NW2d 172 (1973), because the statute fails to recognize the attending physician's constitutionally conclusive medical judgment regarding viability of the fetus or maternal health, fails to specify whether an objective or subjective standard governs, and fails to include a mens rea requirement. The constitutional deficiency of the statute has been compounded in this action by the criminal complaint, which is completely deficient in its allegations regarding defendant's conduct and cannot be saved by mere amendment. It is clear that the statute cannot pass constitutional muster in light of *Roe v Wade*, 410 US 113; 93 S Ct 705; 35 L Ed 2d 147 (1973), and if the Legislature wishes to regulate abortion, then it must do so in a constitutional manner that acknowledges *Roe* and its twenty-seven years of reaffirmation by the United States Supreme Court.

This case arises out of an abortion performed by defendant, a medical doctor, on a woman (who will be referred to as the patient) on October 14 and 15, 1994. Defendant owned and operated two medical clinics in the cities of Highland Park and Bloomfield Hills. On October 14, 1994, the patient presented herself to the clinic in Highland Park because she wished to have an abortion. During the preliminary examination, the patient testified that she believed she was twenty-one or twenty-two weeks pregnant at the time she went to the clinic. In fact, she wrote on her form at the clinic that the date of her last menstrual period was April 25, 1994. According to a pregnancy calculator, using the last date of the patient's menstrual period, the patient was twenty-three or twenty-four weeks pregnant.

On October 14, 1994, the patient had an ultrasound performed on her by Rebecca Black, who has never been licensed or certified as an ultrasound sonographer. While performing the ultrasound, Black informed the patient that she might be "further along" in the pregnancy than believed and that it might not be possible to perform the abortion. The patient's testimony concerning the term of the pregnancy is entirely unclear. First, the patient stated that defendant performed an ultrasound himself immediately after Black performed one and defendant told the patient that her pregnancy had developed to "28 1/2 weeks or something like that." However, the patient had previously given testimony under oath before the state licensing board that she believed that defendant told her that the fetus was 27 or 27 1/2 weeks. The patient testified before the licensing board that Black also informed her that the fetus was 27 or 27 1/2 weeks.

According to the patient, the cost of an abortion varied in relation to the term of the pregnancy. Thus, when the patient first called defendant's clinic, she was told that the cost of an abortion, based on what the patient informed the receptionist regarding her gestational

pregnancy, would be about $1,400 to $1,600. However, the patient stated that when defendant informed her that the pregnancy was actually later term (twenty-eight weeks), she was told that the cost would be $3,000 for the abortion.

Rebecca Black, who identified herself as the medical supervisor and ultrasound technologist in defendant's two clinics, stated that she had worked for defendant for eight years and that she was fired in November 1994. Black, as has been stated, was neither licensed nor certified as an ultrasound sonographer, and her training consisted of learning ultrasound from a woman who was going to school to learn how to perform ultrasounds at a clinic where Black worked before working for defendant. Black testified that she believed that the development of the fetus was twenty-eight weeks, but conceded that a physician determines the gestational age of a fetus on the basis of the ultrasound images. Black further stated that she wrote down in the patient's record that the age of the fetus was twenty-eight weeks, and Black had a photostatic copy of that record with her at the preliminary examination. However, that record was never signed or initialed by defendant and the patient's original medical record indicates that the fetus was at twenty-four weeks gestation.

Additionally, Black had reported defendant to the Wayne County Medical Society for allegedly performing late-term abortions in late October or early November 1994. Black was apparently fired shortly after this report was filed. Black admitted that she had removed original documents and made copies of other documents from patients' files, without the knowledge or consent of the patients, to give to an investigator in order to build a case against defendant. In fact, Black admitted that she was told by Alice White of the Wayne County Medical Society that Black would need to collect evidence to support her claims against defendant. Thus, Black spent

the final six to eight weeks of her job collecting documents from patients' medical files and turned them over to an investigator. Apparently, the propriety of Black's conduct is not the subject of an investigation by the Attorney General's office.

The criminal complaint, dated July 25, 1996, charged defendant with two counts: altering a patient's medical records, MCL 750.492a(1)(a); MSA 28.760(1)(1)(a), and violation of the criminal abortion statute, MCL 750.14; MSA 28.204. Specifically, count II of the complaint alleges:

> Jose Gilberto Higuera did, on or about October 14 and 15, 1994, while in the City of Highland Park, County of Wayne, willfully administer to a pregnant woman (to wit: Jane Doe) any medicine, drug, substance or thing whatever, or did employ any instrument or any means whatever, with the intent thereby to procure the miscarriage of the said Jane Doe who was then and there pregnant and carrying a fetus approximately 28 weeks of age, without there having been a necessity to perform such procedure to preserve the life of the said woman, contrary to the provisions of MCL 750.14 [MSA 28.204], and against the peace and dignity of the People of the State of Michigan. Penalty: Felony, 4 years in prison.

MCL 750.14; MSA 28.204 states:

> Any person who shall wilfully administer to any pregnant woman any medicine, drug, substance or thing whatever, or shall employ any instrument or other means whatever, with intent thereby to procure the miscarriage of any such woman, unless the same shall have been necessary to preserve the life of such woman, shall be guilty of a felony, and in case the death of such pregnant woman be thereby produced, the offense shall be deemed manslaughter.
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> In any prosecution under this section, it shall not be necessary for the prosecution to prove that no such necessity existed.

The statute as written obviously cannot pass constitutional muster in light of the United States Supreme Court's decision in *Roe*. In an effort to save the statute from its constitutional deficiencies, our Supreme Court in *Bricker,* construed the statute so that it would not violate the dictates of *Roe*. In *Bricker, supra,* pp 529-531, the Court stated:

> In light of the declared public policy of this state [to proscribe abortion] and the changed circumstances resulting from the Federal constitutional doctrine elucidated in *Roe* and *Doe* [*v Bolton,* 410 US 179; 93 S Ct 739; 35 L Ed 2d 201 (1973)], we construe § 14 of the penal code to mean that the prohibition of this section shall not apply to "miscarriages" authorized by a pregnant woman's attending physician in the exercise of [the physician's] medical judgment; the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in [the physician's] medical judgment, to preserve the life or health of the mother.
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> . . . We hold that, except as to those cases defined and exempted under *Roe v Wade* and *Doe v Bolton, supra,* criminal responsibility attaches.

Although the parties expend a great deal of argument concerning a "trimester framework," the issue of viability of the fetus is critical because that is the constitutional standard. There is no "line-drawing" or judicial assumptions concerning the issue of viability. In *Roe, supra,* pp 164-165, the United States Supreme Court stated that, "[f]or the stage subsequent to *viability*, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." (Emphasis added). The Court's opinion in *Bricker, supra,* p 530, is in accord with *Roe* because the Court held that "the effectuation of the decision to abort is also left to the physician's judgment; however, a physician may not cause a miscarriage after viability except where necessary, in [the physician's] medical judgment, to preserve the life or health of the mother."

In *Planned Parenthood of Southeastern Pennsylvania v Casey,* 505 US 833; 112 S Ct 2791; 120 L Ed 2d 674 (1992), a majority of the justices reaffirmed the "essential holding" of *Roe*. Justice O'Connor, writing for a majority, stated at pp 846 and 860:

> It must be stated at the outset and with clarity that *Roe's* essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.
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> We have seen how time has overtaken some of *Roe's* factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, . . . and advances in neonatal care have advanced viability to a point somewhat earlier. . . . But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 have no bearing on the validity of *Roe's* central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions. The soundness or unsoundness of that constitutional judgment in no sense turns on whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future. Whenever it may occur, the attainment of viability may continue to serve as the critical fact, just as it has done since *Roe* was decided . . . .

Thus, *Roe* and *Bricker* and subsequent United States Supreme Court cases establish a proscription of abortions at the stage of viability (with the exception of endangerment to the life or health of the woman), not at the beginning of the third trimester or after passage of a certain number of gestational weeks. With regard to determining viability, the United States Supreme Court has stated:

> In these three cases, [*Roe, supra*; *Doe, supra*; *Planned Parenthood of Central Missouri v Danforth*, 428 US 52; 96 S Ct 2831; 49 L Ed 2d 788 (1976)] then, this Court has stressed viability, has declared its determination to be a matter for medical judgment, and has recognized that differing legal consequences ensue upon the near and far sides of that point in the human gestation period. We reaffirm these principles. Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or

> without artificial support. Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus. Viability is the critical point. [*Colautti v Franklin*, 439 US 379, 388-389; 99 S Ct 675; 58 L Ed 2d 596 (1979).]

In the present case, regardless of the actual age of the fetus, which is obviously a matter of factual dispute, the question is whether the fetus was viable at the time of the abortion. There is no allegation in the complaint that defendant aborted a postviable, healthy fetus or that the abortion was unnecessary to protect the mother's life or health. Because the criminal complaint does not allege that the fetus was viable in the judgment of defendant (the attending physician) in light of the particular facts of the case before him or that there was a reasonable likelihood of the fetus' sustained survival outside the womb with or without life support, I would find that the criminal abortion statute is unconstitutionally vague as applied to his alleged conduct.

In order to pass constitutional muster, a penal statute must define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed and in a manner that does not encourage arbitrary and discriminatory enforcement. *People v Lino*, 447 Mich 567, 575; 527 NW2d 434 (1994). There are at least three ways in which a penal statute may be found to be unconstitutionally vague: (1) failure to provide fair notice of what conduct is prohibited, (2) encouragement of arbitrary and discriminatory enforcement, or (3) being overbroad and impinging on First Amendment freedoms. *Id.*, pp 575-576. Vagueness challenges that do not implicate First Amendment freedoms (such as the present case) are examined in light of the facts of each particular case. *Id.*, p 575. When making a vagueness determination, a court must also take into consideration any judicial constructions of the statute. *Id.*

The constitutional deficiency with § 14 of the Penal Code, even as interpreted in *Bricker*, is that the statute does not tie the determination of viability to the attending physician's exercise of medical judgment. This deficiency has been compounded here by the criminal complaint. The Attorney General has charged defendant under § 14 for allegedly causing the miscarriage of a fetus that reached approximately twenty-eight weeks of age. The Attorney General argues that *Roe* and *Bricker* set forth a trimester framework by which to determine when the state can proscribe, and thus criminally prosecute, the performance of abortions, and that abortions performed after twenty-six weeks are, because of the age of the fetus alone, prohibited.[1] First, the Attorney General misapprehends the principles of *Roe* and *Bricker* and ignores the twenty-seven years of case law since *Roe* was decided. It is clear that there is no "trimester framework" and that viability is the critical point. Thus, the criminal complaint here allows the jury to determine the age of the fetus and determine whether the fetus was viable. Under existing United States Supreme Court precedent, it is clear that interpretation of the criminal abortion statute in this manner is unconstitutional.

In *Colautti*, the United States Supreme Court struck down a section of a Pennsylvania statute on the basis that it was unconstitutionally vague. Specifically, the Court held that the viability-determination requirement was ambiguous and its ambiguity was compounded by the fact that the statute subjected the physician to potential criminal liability without regard to fault with respect to the finding of viability. See *Colautti, supra,* p 390. The statute required the physician to conform to the prescribed standard of care if the physician determined that the fetus was viable or if there was sufficient reason to believe that the fetus may be viable. Holding that viability must be that as defined in *Roe* and *Danforth*, the Court found the "may be viable" requirement to refer to a condition that differed in some indeterminate way from the definition of

viability as set forth in *Roe* and *Danforth*. *Id.,* p 393. The Court held that the statute did not allow the physician to make a determination in light of all attendant circumstances (psychological, emotional, and physical) that might be relevant to the well-being of the patient; rather, the statute conditioned potential criminal liability on confusing and ambiguous criteria and, therefore, presented "serious problems of notice, discriminatory application, and chilling effect on the exercise of constitutional rights." *Id.,* p 394.

In ruling that the viability-determination requirement was ambiguous, the Court also held that the statute impermissibly subjected the physician to criminal liability without regard to fault. The Court noted that the statute did not require the physician to be culpable in failing to find sufficient reason to believe that the fetus may be viable. Because of the absence of a scienter requirement in the provision directing the physician to determine whether the fetus is or may be viable, the statue was said to be little more than "'a trap for those who act in good faith.'" *Id.,* p 395, quoting *United States v Ragen,* 314 US 513, 524; 62 S Ct 374; 86 L Ed 383 (1942). Consequently, the Court held that the determination whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician. To be constitutional, state regulation that impinges on such a determination must allow the physician the room the physician needs to make the best medical judgment. *Colautti, supra,* p 397.

Recently, in *Stenberg v Carhart,* 530 US 914; 120 S Ct 2597; 147 L Ed 2d 743 (2000), the United States Supreme Court reiterated the *Roe* and *Casey* postviability requirement that "the governing standard requires an exception 'where it is necessary, in appropriate medical judgment for the preservation of the life or health of the mother.'" *Id.,* 530 US ___; 120 S Ct 2609; 147 L Ed 2d 759, quoting *Casey, supra,* p 879. In *Stenberg,* the Court was faced with a Nebraska

statute that purported to make criminal the performance of a "partial birth abortion." The Court found, inter alia, that the statute was unconstitutional because it lacked any exception for the preservation of the health of the mother. *Stenberg, supra,* 530 US ___; 120 S Ct 2609; 147 L Ed 2d 759. The Court, however, did not merely engraft the exception onto the statute.

In the present case, neither the statute nor our Supreme Court's interpretation in *Bricker* allows the physician to determine whether the fetus is viable in the judgment of the attending physician in light of the particular facts before the physician. Moreover, there is no scienter requirement regarding the determination of viability or the determination of medical necessity. The reason for these requirements was aptly stated in *Women's Medical Professional Corp v Voinovich,* 130 F3d 187, 205 (CA 6, 1997), where the court said, "[t]he determination of whether a medical emergency or necessity exists, like the determination of whether a fetus is viable, is fraught with uncertainty and susceptible to being subsequently disputed by others."

Accordingly, in light of the constitutional deficiencies of our criminal abortion statute, even with *Bricker's* judicial interpretation imposed, the statute must be declared unconstitutionally vague. I would affirm the lower courts' finding that the statute is unconstitutionally vague, albeit using a different analysis than the lower courts, and affirm the dismissal of the charge against defendant under the criminal abortion statute.

/s/ Kathleen Jansen

[1] This case illustrates the problem with engrafting the requirements of a United States Supreme Court decision onto an otherwise unconstitutional statute in order to save the statute. If the Attorney General, trained in and well-versed in the law, misapprehends the constitutional dictates as set forth by the United States Supreme Court, how then can other citizens not trained in the law be expected to know what conduct is or is not proscribed?